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David M. Lawrence

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INTERPRETING NORTH CAROLINA'S OPEN-MEETINGS LAW

DAVID M. LAWRENCE†

INTRODUCTION

North Carolina's comprehensive open-meetings statute,¹ enacted in 1971, has occasioned considerable interest from the public officials subject to it, frequent articles and editorials in the press, and at least a dozen lawsuits alleging violations of its provisions.² Largely because of the regard paid the Act by the press, it has become a highly visible part of governmental processes in the state. Unfortunately, the Act is not clearly drafted; as a result, problems frequently arise that are not easily resolved, and markedly divergent interpretations of the Act have emerged.³ Much of this disagreement arises from basic differences in the methods of statutory interpretation brought to particular situations. One method, sometimes labeled the "literal" approach,⁴ involves looking closely at the words of the statute, seeking to draw out their "obvious" meaning. An alternative approach is to interpret the words of the Act in the context of the purposes it seeks to serve.⁵

† Associate Professor of Public Law and Government, Institute of Government, Chapel Hill, North Carolina; A.B., Princeton University; LL.B., Harvard University.

1. N.C. GEN. STAT. §§ 143-318.1 to -318.7 (1974).

2. See, e.g., cases cited notes 27, 66 & 67 *infra*.

3. See notes 5 & 67 *infra*.

4. See generally 2A C. SANDS, SUTHERLAND'S STATUTES AND STATUTORY CONSTRUCTION §§ 46.01—.07 (4th ed. 1973).

5. An example from the open-meetings statute should help to make the distinction clear. The statute permits governmental boards to hold closed meetings to "consider information regarding . . . an employee or officer *under the jurisdiction*" of the board. N.C. GEN. STAT. § 143-318.3(b) (1974) (emphasis added). It has been suggested that the italicized language limits the exception to meetings in which there are discussions concerning officers or employees whom the board itself has power to appoint, discipline or remove, so that a city council could not hold a closed session to discuss the firing of the fire chief if the power to fire that official rested solely with the city manager. This interpretation is urged by the attorney for the North Carolina Press Association. Raleigh News and Observer, May 10, 1974, at 42, col. 1. Such an interpretation argues that "jurisdiction" means "power to hire, fire, or discipline." Another interpretation, however, would begin with the purposes of the exception: to avoid embarrassment to the person being discussed and, perhaps, as a corollary, to permit freer discussion by the board itself. It makes little difference to the person being discussed whether the board has formal power to take personnel actions: the discussion would be no less embarrassing in either event. Understanding the purposes involved suggests a broader meaning for the

It is the purpose of this article to demonstrate that a consistent use of the second approach, one working within the context of the statutory purposes, will yield sounder results than would use of the first approach. A literal approach to statutory interpretation forgets both the nature of language and the realities of the legislative process in North Carolina. Language is but a tool to convey meanings, and often an imperfect one. A person's thoughts are frequently more complex than his ability to express them. His words simply approximate his full meaning. To understand the full meaning, we must look not only to the words themselves but also to their context. With legislation, context includes an appreciation of the purposes the words seek to express.

Take a simple word like "street." We all know what a street is, and so there should be no difficulties in interpreting the word in a statutory context. Or do we? Or at least does the word always carry the same meaning? Does "street," for example, include the sidewalk running alongside the vehicular roadway? We shall see that different statutes with different purposes provide different answers.

Section 136-41.1 of the North Carolina General Statutes allocates to cities the proceeds of one cent of the state's nine-cent gasoline tax, to be used, according to section 136-41.3, for constructing and maintaining public streets in the cities. Because the latter section contains no definition of "streets," the general practice has been to rely on opinions of the Attorney General to define the permissible uses of these state street-aid funds. Beginning with a 1955 opinion,⁶ the Attorney General's office has ruled that sidewalks *are not* a part of streets for purposes of section 136-41.3, and, therefore, street-aid funds may not be expended for sidewalk construction and maintenance.

However, the right-of-way of a "street" is generally agreed to include the land necessary for both roadway and sidewalk.⁷ Section 160A-299 of the General Statutes sets forth a procedure under which a city can permanently close an unused right-of-way, returning title to the abutting landowners. The procedure extends only to "streets" and "alleys"; no mention is made of sidewalks. Yet certainly no one would argue that only that portion of the "street" to have been used for a

word "jurisdiction"—that is, the "power to legislate" concerning the office or position under consideration. Under the second interpretation, the city council could in closed session consider the firing of the fire chief.

6. Letter from Attorney General to J.L. Womack, City Manager of Reidsville, N.C., June 6, 1955, on file in University of North Carolina Institute of Government library.

7. *Ham v. City of Durham*, 205 N.C. 107, 107-08, 170 S.E. 137, 138 (1933).

roadway may be closed under the procedure. The entire "street," including that portion needed for sidewalks, would be closed.

The different purposes of the two statutes justify a difference in meaning in the common word "street." The first specifies the uses that may be made of monies derived from the gasoline tax, and in that context a limitation of "street" to the roadway, the way open for vehicular travel, is not nonsensical. The second, however, seeks to provide a method for clearing the records of streets dedicated to the public but never opened; since the original dedicated "street" will often have included land for sidewalks, so too should the street that is closed include that land. The statutes serve different purposes, create different contexts, and therefore invest the word "street" with different meanings.

In addition to ignoring the vagaries of language, a literal approach to statutory interpretation ignores the methods of legislation in North Carolina. Until quite recently, the General Assembly has not employed its own professional staff. Bills were drafted by the Attorney General's staff, by attorneys for local governments, by lobbyists, or by legislators. Although most bills were probably drafted by attorneys, the draftsmen were usually without special training or experience in legislative drafting and were often too hurried to use what special skills they did have. In addition many statutes contain provisions inserted as floor amendments, in the midst of debate and in response to very particular problems that arose during debate. Often such amendments are hurriedly drafted, frequently by persons without legal training; and if the amendment solves the problem posed, it is normally accepted without concern for other implications. Here, especially, language only approximates meaning.

The open-meetings statute is a product of this legislative process. Two bills were introduced in the 1971 house and were consolidated by a house subcommittee into one committee substitute, which itself was amended on the floor of the house. In the senate, the bill again went to a subcommittee which produced another committee substitute, but one that continued the substance and much of the language of the final house product. On the senate floor further amendments were added, and the final senate product was accepted by the house. The only stage at which *professional* drafting of any sort was used was at the outset, and the final statute bears little resemblance to those two original bills.⁸

8. The two bills were H. 51 and H. 113, which were combined under H. 51. The progress of the latter through the General Assembly is charted in H. JOUR., [1971] N.C.

Under these circumstances it disserves the General Assembly to insist on a literal reading of the statute, to divorce meaning from context and from the policies behind the various provisions of the statute. Our supreme court has from time to time invoked an approach to statutory interpretation that does acknowledge statutory purpose and seeks meaning in the context of purpose. *Mullens v. Town of Louisburg*,⁹ for example, involved the question whether section 143-129 of the General Statutes, which allowed cities, among other governmental bodies, to purchase "apparatus, supplies, materials, or equipment" costing more than \$1,000 only after advertising for and receiving sealed bids, extended to the purchase of electric power from a power company. Rather than assaying whether a dictionary definition of "supplies" included electric current, the court looked first to the purposes of the purchasing statute: "to prevent favoritism, corruption, fraud, and imposition in the award of public contracts, . . . assuring competition which in turn guarantees fair play and reasonable prices."¹⁰ In this instance, no competition between bidders was possible, since, because of state regulation, "there could be but one bidder who could name only the rate or price" fixed by the Utilities Commission.¹¹ Because the *purposes* of the statute were not involved in such transactions, the court held that contracts to purchased electric energy were not subject to it.

Another example was *In re Yelton*.¹² State constitutions frequently contain provisions that are statutory in their detail, attempts by one generation to extend its public policies to later generations. North Carolina's constitution is no exception. One such provision has been the prohibition on dual officeholding, which becomes statutory with the detail of its exceptions.¹³ At the time of World War II, one of the exceptions was for "officers in the militia." *Yelton* raised the question whether that language permitted a state officer to accept a commission in the United States Army for the duration of the war without violating

General Assembly 55, 294, 313-14, 321-22, 954, 963, 1029; S. JOUR., [1971] N.C. General Assembly 188, 515, 520, 527, 545, 551-52, 556-57.

The Institute of Government provides a reporting service for each session of the General Assembly. In doing so, the Institute receives a copy of each bill introduced and each amendment and committee substitute offered; these are placed on file in the Institute library. By comparing the house and senate journals with this original bill file, the passage of a bill through the legislature can be exactly reconstructed.

9. 225 N.C. 53, 33 S.E.2d 484 (1945).

10. *Id.* at 58-59, 33 S.E.2d at 487.

11. *Id.* at 59, 33 S.E.2d at 488.

12. 223 N.C. 845, 28 S.E.2d 567 (1944).

13. The present provision is found in N.C. CONST. art. VI, § 9.

the dual-officeholding prohibition. Following the same approach as in *Mullens*, the court looked to the purposes of the militia exception, saw that they were equally applicable to an officer in the regular army during wartime, and therefore read "militia" to include the regular armed forces of the United States. Such a reading did not stretch "militia" beyond meaning, but it was certainly not the only possible reading of the word.¹⁴

It is the frame of mind exemplified by these two cases that one should bring to the open-meetings statute. The statute begins with a declaration of legislative policy and a blanket requirement that meetings of governmental groups be open. Then follows a series of exceptions to the blanket requirement, either for certain subjects or for certain kinds of groups. Both the initial requirement of openness and the subsequent exceptions to that requirement should be read within both the general context of concerns that led to the legislation and the particular context of concerns that led to each exception. The detailed analysis of the statute that follows attempts to interpret its provisions sympathetically to the purposes behind each of them—both the requirement to open the doors and the permission to close them.

I. THE FUNDAMENTAL REQUIREMENT OF OPENNESS

A. Groups Covered

Three alternative tests establish what groups are subject to the statute. A group with authority to "conduct hearings," to "deliberate" or to "act as [a body] politic and in the public interest" is subject to the statute.¹⁵ This is very broad coverage. Authority to act as a body politic presumably includes not only such powers as adopting ordinances, levying taxes, fixing charges and resolving disputes, but also the basic power to take final action on any sort of public business, such as hiring or firing employees, purchasing property, and establishing operating policies. Most groups authorized to take action also enjoy authority to conduct hearings, but this second test would extend the statute's coverage to groups that hold hearings as a means of gathering information to formulate recommendations to other groups or to officials. Local planning commissions frequently do this, as do committees of groups

14. The present dual officeholding provision codifies the result of the *Yelton* case. It excepts "any officer of the military forces of the State or of the United States not on active duty for an extensive period of time." N.C. CONST. art. VI, § 9.

15. N.C. GEN. STAT. § 143.318.2 (1974).

that may take action. Finally, authority to deliberate brings in any group not covered by one of the other two tests. To deliberate means nothing more than to discuss, to consider together with a view toward deciding a matter before the group. It is difficult to think of a group that would *not have authority* to take action, to conduct hearings, or to deliberate. What other reason could there be for the group's existence?

The statute's statement of policy indicates an intention that it extend to groups that "administer the legislative and *executive* functions of this State and its political subdivisions."¹⁶ What is meant by "executive"? Does the statute, for example, extend to a staff committee (comprising the budget officer, public works director, and finance officer) established by a city manager to review projects proposed by city departments for inclusion in the city's five-year capital improvement plan? Typically such a plan would be reviewed by the manager and perhaps by the planning commission and then adopted by the governing board. Even then it would be simply a plan, not a binding commitment. Such a committee exercises executive functions¹⁷ and possesses authority to deliberate, to talk over what it is doing. It would seem to be covered. Yet common sense disputes such a conclusion. It is suggested below that implicit in the statute is a requirement of public notice of meetings.¹⁸ Such a requirement is simply impractical when applied to an ad hoc group of the sort described. The group will often meet on short notice, when the participants can free themselves from regular duties, and normally in the office of one of the members. Obviously, these practical considerations can be carried too far: the same things might be said of a special meeting of a school board or town council. But the staff committee's work is buried several layers deep in the decision-making process. Its proposals will be reviewed by others before they finally go to the body with power to act. These circumstances cause us to seek some other meaning for "executive."¹⁹

16. *Id.* § 143.318.1 (emphasis added).

17. It might be argued that such a group is involved in policy formulation and not policy execution, and thus is not exercising *executive* functions. However, that would lead to characterizing the group's work as legislative, which does not answer the problem. Moreover, its work would be done in the context of policies set by its city council and would be concerned with furthering those policies. Thus, the work is executive in a broad sense.

18. See text accompanying note 27 *infra*.

19. In *People ex rel. Cooper v. Carlson*, 28 Ill. App. 3d 569, 328 N.E.2d 675 (1975), the Illinois open-meetings act, which extends to "legislative, executive, administrative, or advisory bodies," was held not to govern weekly meetings of the five division heads of the Kane County development department. The "group" involved had not been established nor authorized by any statute or ordinance.

Many groups in state and local government—commissions, boards, authorities—cannot accurately be described as “legislative.”²⁰ Rather, they operate public facilities, enforce statutes and regulations, administer public programs, and so on. They can best be characterized as administrative agencies. I believe that the word “executive” was used to clearly include these agencies under the statute. They are formal bodies, with continuing responsibilities, established by action of a legislative body. These characteristics are sufficient to distinguish them from the kind of informal, ad hoc group described above, established by an administrator to help develop and carry out policy.

B. Official Meetings

If a group is subject to the law, all of its “official meetings” must be open unless the meeting fits within one of the exceptions discussed below. The definition of “official meeting” tracks the three tests establishing the groups subject to the law: an official meeting occurs whenever a majority of the members of a group get together to conduct hearings, deliberate, or vote on or otherwise transact public business.²¹ There should be no problem in deciding whether a group has gathered to take action or conduct a hearing; problems do arise, however, when the question is whether a group is deliberating. Many local governing boards hold sessions variously characterized as agenda meetings, work sessions, or the like. Sometimes these meetings are merely for additional discussion by board members of matters before the board. The discussion can proceed more informally than would be possible in a formal meeting, and perhaps members of the administrative staff might join the discussion. Other times these meetings function mainly to elicit information, with presentations from the staff and questions by board members. Another type of meeting is the “retreat”—the board, a few staff members and perhaps consultants, get together very informally to discuss some matter in a general way. Often such a meeting will most

20. Some are best characterized as *both* legislative and executive. For example, city councils and boards of county commissioners exercise both types of functions on the local level, while the Wildlife Resources Commission does so at the state level.

21. N.C. GEN. STAT. § 143-318.2 (1974). In early 1975 the author had a chance conversation with a member of the committee that developed the house committee substitute for the open meetings bill. He reported that one of the most important changes made in the substitute from the original bill was the limitation of the statute's coverage to “official” meetings. He reported that the addition of “official” was intended to restrict the law's coverage. He was surprised, but pleased, that no one had noticed the change on the house floor and stressed its importance to me. He didn't realize, however, that the change was noticed in the senate, and the definition of “official meeting” added.

resemble a seminar. Do any of these more or less informal sessions involve "deliberations" within the meaning of the statute?

Surely the informal discussion of a matter before the board constitutes deliberation. The members are discussing specific public business with a view toward eventual decision. That the discussion is conducted without the parliamentary trappings of a formal meeting should not make it any less a deliberation. On the other side, the retreat or seminar probably does not constitute deliberation. The participants are not working on any particular matter of public business but rather are expanding their store of background knowledge. Unresolved, however, is the middle case, the session to gather information regarding a specific matter now or soon to be before the board.

Here one might consider some of the possible purposes served by the open-meetings statute. An obvious one is to set before the public the voting record of members of groups covered by the statute. That purpose, however, could be satisfied by a simple requirement that all actions be taken in open session, and the North Carolina statute goes further than that. Its extension to deliberations indicates at least the additional purpose that the public have some indication why officials vote as they do. This purpose compels opening up the informal discussion meeting but does not resolve the question of the informational meeting. The inclusion of deliberations under the law may also suggest a third purpose—to educate the public concerning the factual basis of and the issues involved in any public question. Discussions among board members will not only set forth their reasons for voting as they do but often will publicize many of the facts on which those reasons are based. In addition, hearings also constitute official meetings, and a hearing often serves to educate the public as much as it does to permit the public to express their sentiments to the board. If, then, this educational or publicizing function is recognized as a purpose served by the statute, an informational meeting should be understood as an essential element of the deliberative process and be covered by the statute.²²

22. In *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors*, 263 Cal. App. 2d 41, 69 Cal. Rptr. 480 (3d Dist. 1968), the court held that California's open meeting statute, the Brown Act, extended to a meeting that involved only deliberations, in that case a luncheon. In reaching its conclusion, the court noted:

Recognition of deliberation and action as dual components of the collective decision-making process brings awareness that the meeting concept cannot be split off and confined to one component only, but rather comprehends both and either. To "deliberate" is to examine, weigh and reflect upon the reasons for or against the choice. . . . Public choices are shaped by reasons of fact, reasons of policy or both. Any of the agency's functions may include or depend

An official meeting takes place whenever *a majority of a board's members* gather together to act, hold a hearing, or deliberate.²³ For almost all boards that number is also a quorum, and perhaps the specific reference to a majority of members means nothing more than a board meeting at which a quorum is present. Yet on its face the reference may mean a good deal more than that. The exact language is that "every . . . gathering together at any time or place of a majority of the members [of a group under the statute] for the purpose of . . . participating in deliberations" constitutes an official meeting. Where does that leave a luncheon of three of five members of a town board, at which they discuss a proposed Sunday-closing ordinance? What if the conversation is unplanned? They are a majority, and they seem to be deliberating. In Florida, such a meeting seemingly would be considered subject to that state's open-meetings law.²⁴ Yet such a result intrudes very far into an official's ability to lead a normal life. In addition, any requirements of notice implicit in the statute could not be met, at least not with an accidental meeting.

These practical considerations argue that the statute extends only to meetings that are meetings of the board itself and not to informal gatherings of some members. Of course, abuse would then be possible: the three members may decide at lunch on a common course of action, thereby effectively deciding the issue without public observation of the process. They may even constitute a permanent caucus and proceed that way on all issues. The proper response to that sort of abuse would lie, however, in the enforcement process rather than the interpretational process. The statute permits "social meeting[s] or other informal assembl[ies]," unless called or held to evade the spirit and purposes of the statute. That permission would seem to allow normal social contact among board members, plus some informal dis-

upon the ascertainment of facts. . . . Deliberation thus connotes not only collective discussion, but the collective acquisition and exchange of facts preliminary to the ultimate decision.

Id. at —, 69 Cal. Rptr. at 485.

23. N.C. GEN. STAT. § 143-318.2 (1974).

24. In 1972 the Charlotte (Florida) County Commission appointed a three-member committee (two commission members and the county appraiser) to recommend one of two firms to conduct a county property reappraisal. The two commission members visited Tennessee to interview customers of the two firms and, while there, agreed that one of the two firms was preferable. On their return they met with a representative of the preferred firm in a motel dining room to clarify several points. After the contract was awarded, the losing firm sought to enjoin its enforcement because of violations of the Florida open-meetings law. In *Bigelow v. Howze*, 291 So. 2d 645 (Fla. Ct. App. 1974), a district court of appeals held that the Tennessee discussions and the motel discussions did violate the Florida law and held the contract void.

cussion of issues before the board, yet still prohibit a majority caucus from deciding matters away from public observation.

C. *Public Notice of Meetings*

By its terms the statute prohibits *closed* meetings, as opposed to *secret* meetings. That is, it prohibits denying a citizen access to a meeting required to be open, but it does not, on its face, require that the citizen be told that the meeting will be held. Nor do other statutes generally require public notice of meetings of public bodies, especially of special meetings. For example, section 160A-71, which applies to cities, permits a special meeting of a city council merely upon notice to each member. Even those statutes that do require public notice may not apply to all meetings subject to the open meetings law.²⁵ Counties, for example, are required to give public notice before special meetings of the county commissioners.²⁶ But arguably, "meeting" in that statute refers to meetings at which action may be taken, and a special session called simply to discuss a matter might not be covered, even though it normally must be open.

Yet to argue that the statute proscribes only closed meetings and permits secret meetings as long as they are "open" is to argue that the General Assembly enacted an illusion. The basic purpose of the open-meetings law is to permit the public to attend meetings of public bodies—to learn what boards are doing, to learn why they are doing it, and perhaps to affect the substance of public action by the mere pressure of public attendance. To permit secret meetings, so long as no one is turned away, would strike at the heart of that basic purpose. The answer is to take an expansive view of the statute's requirement that meetings be "open" and that persons not be "denied access" to meetings. A meeting cannot be considered open if it is unknown, and a denial of access occurs not only when someone is physically barred at the door, but also when only members of a group know of its meeting.²⁷

25. See, e.g., N.C. GEN. STAT. § 153A-40(b) (1974).

26. *Id.*

27. A requirement of notice has already been introduced by at least two superior courts. In *Weathers v. Shelby Bd. of Alcoholic Control*, 75 CVS 290 (Cleveland County Super. Ct., July 16, 1975), the court concluded that the open meetings requirement included a "reasonable opportunity for the public to know of the time and place" of meetings. Therefore, the court ordered the defendant (1) to give six hours' notice to the news media of each special meeting, (2) to post notice of each special meeting on the door of the Shelby ABC store, and (3) to give notice of each special meeting to any person requesting notification. In *News & Observer Publishing Co. v. Interim Bd. of Educ. for Wake County*, 75 CVS 6299 (Wake County Super. Ct., Dec. 31, 1975), the

II. EXECUTIVE SESSIONS FOR SELECTED TOPICS

A. Introduction

The first two sections of the open-meetings act assert a broad right of public access to the meetings of state and local government agencies. Countervailing policies exist, however, based primarily on concern for personal privacy and reputation and for protection of the interests of the units and agencies themselves when in adversary situations. These policies, too, are recognized in the statute, through its exceptions.²⁸

The Act permits closed meetings in eight subject-matter areas, listed in section 143-318.3 of the General Statutes. Before turning to the individual exceptions, two problems that affect the entire section must be addressed.

The introductory language of subsection (a) sets out a procedure for calling executive sessions: a board may, during a regular or special meeting, vote to go into an executive session of that meeting; presumably the vote itself will occur in open session. But subsection (a) lists only five of the subjects for which an executive session may be held. The other three are authorized in subsections (b) and (c), where the procedures of subsection (a) do not on their face apply. The distinction does have some minor importance. If a board must vote to enter an executive session and do so during an open meeting, then the public, either through attendance at the open meeting or later examination of the board's minutes, will at least know that an executive session took place and if the motion states the purpose of the session, will know generally what was to be discussed. Otherwise, there may be no public evidence of a closed meeting.

Subsection (a) goes on to state that the executive session may be held "while considering" any of the five listed subjects. Does the use of the word "considering" constitute a limitation, one that permits consideration but, impliedly, prohibits taking binding action in executive session? Subsections (b) and (c) again differ from (a) and do not

court reached the same conclusion and issued a preliminary injunction requiring forty-eight hours' posted notice of any meeting. In addition, the tendency in other states has been to read such a notice requirement into open meetings statutes. *E.g.*, *Sullivan v. Credit River Township*, 299 Minn. 170, 217 N.W.2d 502 (1974).

28. In recognizing that closed meetings may sometimes be in the public interest, the Act has profited from the lessons of its only immediate predecessor. Before adoption of the present Act, the only comprehensive open-meetings statute applied to city councils and contained no exceptions. Law of Mar. 6, 1917, ch. 136-XIII, § 1(b), [1917] N.C. Sess. Laws 200. It was widely violated, and certainly the lack of reasoned exceptions was in part responsible for those violations.

contain a comparable limitation—if limitation it is. Subsection (b) requires that final action on the discharge of an officer or employee take place in an open meeting, implying that final action on lesser measures, such as a suspension, need not. And subsection (c) explicitly permits executive sessions for “considering and *taking appropriate action*” in public emergency situations.²⁹ In this context, subsection (a) meetings might well seem limited to *consideration* of the listed topics. Yet such a result makes no sense. To use subsection (a)(1) as an example, an executive session may be held “while considering acquisition, lease, or alienation of property.” An obvious purpose of this provision is to permit a board to instruct its agent in a property negotiation. Those instructions, such as the final price that may be offered, must remain secret if they are to be effective. Yet the instructions constitute action. If the property exception is to be of any use, it must permit both consideration and decision, and similar points can be made for each of the subjects listed in subsection (a).³⁰

B. *Property Transactions*

Several state open-meeting statutes include exceptions for property transactions,³¹ but North Carolina's is unique in the literal breadth of its language. A covered board may meet in executive session “while considering . . . acquisition, lease, or alienation of property.”³² Setting out a series of situations that arguably fall within the exception should help clarify the problems it raises:

- (1) A board meets to develop a negotiating position regarding property it wishes to buy or sell.

29. N.C. GEN. STAT. § 143-318.3(c) (1974) (emphasis added).

30. In the only three cases found from other states that raise similar questions, each court gave an expansive reading to “consider.” In *Lucas v. Board of Trustees*, 18 Cal. App. 3d 988, 96 Cal. Rptr. 431 (1st Dist. 1971), the state statute's permission “to consider the appointment, employment or dismissal of a public officer or employee” in closed session was held to permit voting for dismissal at such a session. In *State ex rel. Cities Serv. Oil Co. v. Board of Appeals*, 21 Wisc. 2d 516, 124 N.W.2d 809 (1963), the court held that a board of zoning appeals that was permitted to “deliberate” in executive session after its public hearing was also permitted to vote on the subject of its deliberations at such a session. And in *School Dist. #10 v. Witte*, 5 Ill. App. 3d 600, 283 N.E.2d 718 (1972), the court held that a statutory permission to hold a closed meeting “where the acquisition or sale of property is being considered” permitted a board to decide to purchase in the closed meeting. *Id.* at 602, 283 N.E.2d at 720.

31. ILL. ANN. STAT. ch. 102, § 42 (Smith-Hurd, Cum. Supp. 1975); IOWA CODE ANN. § 28A (Cum. Pamphlet 1975); MO. ANN. STAT. § 610.025.2 (Vernon, Cum. Supp. 1976); N.H. REV. STAT. ANN. § 91A:3II(d) (Supp. 1975); WIS. STAT. ANN. § 66.77(4)(d) (Cum. Supp. 1975).

32. N.C. GEN. STAT. §§ 143—318.3(a)(1) (1974).

(2) A board meets to decide which parcels of property to purchase from among several options.

(3) A board meets to decide whether it should continue leasing office space or should acquire its own office building.

(4) A board meets to decide which bid it should accept for purchase of new automobiles.

(5) A board meets to decide what procedure it should use in disposing of surplus property: auction, negotiated sale, or sealed bid.

Each of these situations arguably involves consideration of the "acquisition, lease, or alienation of property," albeit some more clearly so than others. Yet, I suspect, the typical first reaction would be that only the first and possibly the second situation are covered by the exception.³³ But how can it be limited in any sort of principled way, given the breadth of the language? The answer lies in reading the exception within the context of its presumed purposes.

In several other open-meetings statutes the purpose of the property-transaction exception is made explicit. Missouri's, for example, permits closed meetings to consider the "leasing, purchase or sale of real estate where public knowledge of the transaction might adversely affect the legal consideration therefor."³⁴ Similarly, Wisconsin's permits closed meetings when "deliberating or negotiating on the purchasing of public property, the investing of public funds, or conducting other public business which for competitive or bargaining reasons require [them]."³⁵ It seems likely that the same general purpose—saving money for the public—led to the North Carolina exception. Thus, it is suggested that the boundaries of the exception be established with reference to this purpose. If public discussion of a property transaction will weaken the board's bargaining position or drive up the price it must pay, then the transaction falls within the exception. Otherwise, it does not.

Returning to the five situations, the first obviously falls within the exception. Public knowledge of the negotiating position of a governmental agency would impair its bargaining capacities and possibly cause the agency to pay more or accept less for a piece of property. Situations

33. An argument may be drawn from the statute itself that situation (4), the award of a contract from a number of bids, is not included within the exception. N.C. GEN. STAT. § 143-318.4(2) (1974) exempts entirely from the act the State Board of Awards, which awards state contracts. If the property-transaction exception extends to situation (4), the Board of Award exception would be superfluous. Of course, as a practical matter, the latter may have been inserted in order to "make sure."

34. MO. ANN. STAT. § 610.025.2 (Vernon, Cum. Supp. 1976).

35. WIS. STAT. ANN. § 66.77(4)(d) (Cum. Supp. 1975).

(3) through (5) would normally not involve any potential financial detriment to the agency if discussed in public and thus would not fall within the exception. The second situation might go either way, depending on the particular facts. If several parcels must be assembled, the board may wish to proceed quietly, perhaps even through a straw person, in order to avoid having one or two owners hold out for speculative profits. In such a case, closed-meeting discussion of this procedure would fall within the policy of the exception. On the other hand, if a board is choosing between several parcels of property with known prices, the discussion is likely to involve nonfinancial considerations and would not fall within the exception.

The interpretation posed by this analysis leaves much to the initial discretion of the board involved. Yet, most boards do want to comply with the statute, and these guidelines should assist them. If a board abuses its discretion or makes a mistake, later judicial review would always be available.

C. *Employee Negotiations*

This exception is like that for property transactions: the governmental unit or agency is involved in a negotiating situation and must be allowed to develop its position in confidence. The obvious use of this exception is to permit development of a negotiating position, to hear reports on proposals of employee representatives, and to decide whether to accept proposals of employee representatives. The exception could also extend to the actual negotiations, but since these are normally conducted by an agent, the law would not apply.

North Carolina law is basically hostile to public employee unionization. Section 95-97 of the General Statutes prohibits public employees from joining labor organizations, while section 95-98 prohibits collective bargaining agreements between governmental units and agencies and employee organizations. In *Atkins v. City of Charlotte*,³⁶ a three-judge district court held section 95-97 to be unconstitutional on its face but upheld section 95-98.³⁷ Thus, public employees may join

36. 296 F. Supp. 1068 (W.D.N.C. 1969).

37. *Id.* at 1075-77. In *International Longshoremen's Ass'n v. North Carolina Ports Authority*, 463 F.2d 1 (4th Cir. 1972), the Ports Authority was held to be a carrier subject to the jurisdiction of the National Mediation Board. The court of appeals did not reach the question of whether federal law superseded section 95-98 of the statute as to the ports authority, but remanded to the district court. The district court did hold that the Railway Labor Act superseded section 95-98 with regard to the Ports Authority and certain of its employees. *International Longshoremen's Ass'n v. North Carolina*

unions, but public employers may not enter into collective bargaining agreements with those unions. However, the federal court seemed to assume that bargaining would take place—that was the purpose of union membership—but that no formal agreement could be reached. The union would have to rely on the good faith of the employer, rather than an enforceable contract, to safeguard the results of bargaining. The open-meetings exception seems a legislative recognition of this factual state.³⁸

D. Medical Affairs

The Act establishes a broad, nearly inclusive, exception for matters dealt with by hospitals and other medical clinics.³⁹ Besides hospitals, the exception extends to public health and mental health clinics. The primary group benefiting from the exception is the professional staff of such an institution in its periodic staff meetings; however, the governing board of an institution and occasionally the governing board of a city or county funding such an institution might also discuss matters within the exception.

The primary uncertainty raised by the exception is whether it extends only to discussions concerning individual patients, employees and professional staff, or extends also to discussions of policies and other matters affecting patients, employees, or staff as groups.⁴⁰ For employees, and to a slightly lesser extent for professional staff, the language of the exception indicates the latter interpretation. The exception speaks of "negotiations, contracts, conditions, . . . [and] regulations . . . relating to employees," all clearly matters involving such persons as a group. It also speaks of "all aspects of hospital management, operation and discipline relating to professional staff," a phrasing most naturally referring to these people as a group as well. Regarding patients,

Ports Authority, 370 F. Supp. 33 (E.D.N.C. 1974). After extended negotiation, the authority signed a contract with the union on June 14, 1974. In *Winston-Salem Forsyth County Unit, N.C. Ass'n of Educators v. Phillips*, 381 F. Supp. 644 (M.D.N.C. 1974), another three-judge district court agreed with the *Atkins* court that section 95-98 was constitutional, there, as applied to school teachers.

38. Some examples of city-union activity are found in Pfefferkorn, *Professional Negotiations in North Carolina: An Alternative to Formal Collective Bargaining for Public Employees*, 7 WAKE FOREST L. REV. 189, 190-97 (1971).

39. N.C. GEN. STAT. § 143.318.3(a)(3) (1974).

40. The legislative history of the provision suggests that something more than discussions of specific individuals was intended. As passed by the House, the exception extended only to "matters dealing with specific patients or employees or members of the medical staff of a hospital or medical clinic." The much more expansive language of the final act was added by the senate committee. See note 8 *supra*.

however, the language of the statute is neutral.⁴¹ The primary policy of the patient exception would seem to be protection of individuals from embarrassment. A hospital staff ought to be able to discuss a person's illness, the possible treatment and the prognosis, and how much such a person has been charged and has paid in private session. A comparable need to discuss patient matters generally—such as procedures of admission and discharge, of treatments, and of records, and the level of hospital fees—is not as clear. Particularly with regard to financial matters, there are strong arguments for discussion and decision in public. The fees charged by a public institution and the policies on access and use of the institution are very much public business, and those paying the fees and financing the institution have a legitimate interest in how those fees and policies are established. Therefore, the patient portion of the exception should be limited to matters involving individual patients.⁴²

E. Privileged Relationships

By privileged relationships, the statute presumably refers to those relationships that involve privileged communications under North Carolina laws of evidence and to situations within such a relationship involving a privileged communication.⁴³

For purposes of the open-meetings statute, the most important privileged relationship is that of attorney and client. The privilege protects confidential communications from client to attorney, and thus the exception permits a board to meet with its attorney to discuss a confidential matter.⁴⁴ This exception offers significant opportunity for abuse. The privilege exists to permit unfettered communications *be-*

41. "All aspects of admission, treatment, and discharge, all medical records, reports and summaries, and all charges, accounts and credit information pertaining to said patients . . ." N.C. GEN. STAT. § 143-318.3(a)(3) (1974).

42. Obviously, the line between individual and group matters is not always sharp. In discussing a possible treatment, a staff doctor might illustrate with particular cases. Certainly if names are used, this falls within the exception.

43. 1 H. BRANDIS, STANSBURY'S NORTH CAROLINA EVIDENCE §§ 53-65 (1973).

44. In California, an exception for meetings involving privileged communications within the attorney-client relationship has been read into the open meetings law by judicial decision. *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors*, 263 Cal. App. 2d 41, 69 Cal. Rptr. 480 (3d Dist. 1968). In Arkansas and Florida, however, courts have refused to create such an exception if none appears in the statute. *Laman v. McCord*, 245 Ark. 401, 432 S.W.2d 753 (1968); *Times Publishing Co. v. Williams*, 222 So. 2d 470 (Fla. Ct. App. 1969). The Minnesota Supreme Court recently appeared willing to read in such an exception on a case-by-case basis. *Channel 10, Inc. v. Independent School Dist. No. 709*, 298 Minn. 306, 215 N.W.2d 814 (1974).

tween client and attorney and therefore should be the basis of a closed meeting only when the attorney is present to listen and offer advice. A board should not use the attorney's mere presence as an excuse to discuss a matter in closed session when the attorney's legal advice is not sought, nor should an attorney permit a board to do so.

A more difficult issue is whether the existence of the open-meetings statute limits the scope of the privilege. The privilege extends only to *confidential* communications. A private client enjoys wide discretion in determining what is confidential and therefore privileged. For the most part, if a communication is made only to a person's attorney, it is confidential, and the client may insist upon the privilege. Although there may be considerations in the law of evidence that counteract the privilege,⁴⁵ no general policy exists that private persons and associations should conduct their affairs openly. Such a policy of openness, however, does apply to public agencies, articulated not only by the open-meetings statute but also by the common-law and statutory policy that public records are indeed public and open to inspection.⁴⁶ This policy of openness must moderate a public client's discretion in determining which communications to its attorney are confidential. Otherwise, the simple desire of a board to discuss a matter in private with the board's attorney, for whatever reason, might cause the board to characterize the matter as confidential, thereby seriously undermining the purpose of the open-meetings statute. Both board members and attorneys should construe the notion of confidentiality narrowly, limiting it to situations in which the interests of the unit itself, and not merely the political interest of board members, might be harmed by disclosure. Only rarely should occasions arise for using the exception that are not also occasions for use of some other exception, such as those for property negotiation or litigation.⁴⁷

Of the remaining privileged relationships, the one that seems most likely to prompt a closed session is the qualified privilege that protects the identity of an informer.⁴⁸ A board might be approached by an

45. 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2291 (McNaughton rev. 1961).

46. N.C. GEN. STAT. §§ 132-1 to -9 (1974).

47. In the California and Arkansas cases in which the courts were asked to read an attorney-client privilege exception into an open meetings statute, the proponent's argument rested heavily on the need for confidentiality in litigation situations. See note 44 *supra*. North Carolina's statute, of course, contains a separate exception for such situations. N.C. GEN. STAT. § 143-318.3(a)(5) (1974).

48. *E.g.*, State v. Moore, 275 N.C. 141, 166 S.E.2d 53 (1969).

informer concerning some matter within its jurisdiction; it could meet with him in closed session in order to protect his identity. Alternatively, it might discuss an informer's information with the person (for example, a police officer) who met with the informer. If the board wished to know the informer's identity, it could go into closed session to hear it. The information offered by an informer, however, is not within the privilege.

Three other privileged relationships might occasion properly closed meetings, but the situations involved are already excepted. First and second are the physician-patient and companion psychologist-client privileges.⁴⁹ Occasionally a doctor or psychologist might bring a particular case before a formal committee or staff meeting of the hospital or clinic in which he worked, and the discussion might naturally involve matters within the privilege. More commonly, hospital or clinic procedures might involve committee review of patient records within the privilege. The exception would permit these meetings to be closed. However, the broad hospital-affairs exception would also include these meetings. The third privilege would be that apparently established for probation officers.⁵⁰ The Probation Commission would be entitled to hear any matters privileged under this section, but its meetings are separately excepted from the law.

Two remaining privileged relationships, husband-wife⁵¹ and school counselor-pupil,⁵² seem unlikely to raise situations subject to the open-meetings law. A school board might be interested in some matter within the latter privilege in connection with a pupil discipline case, but that would be a proceeding in which the pupil might very well wish to assert the privilege. In any case, meetings dealing with pupil discipline are separately excepted.

F. *Litigation*

Deliberations concerning "judicial action[s] or proceeding[s]" are excepted from the statute.⁵³ As with any litigant, a governmental board

49. N.C. GEN. STAT. § 8-53, -53.3 (1969).

50. "All information and data obtained in the discharge of official duty by any probation officer shall be privileged information, shall not be receivable as evidence in any court, and shall not be disclosed directly or indirectly to any other than the judge or to others entitled under this Article to receive reports, unless and until otherwise ordered by a judge of the court or the Secretary of Correction." *Id.* § 15-207 (1975).

51. This common law privilege is continued in *id.* § 8-56 (1969) (civil actions) and *id.* § 8-57 (Cum. Supp. 1975) (criminal actions).

52. *Id.* § 8-53.4 (Cum. Supp. 1975).

53. *Id.* § 143-318.3(a)(5) (1974).

needs to plan litigation strategy in some confidence, and this seems to be the policy behind the exception.

Governmental bodies and agencies are party to or affected by not only proceedings before courts but also proceedings before quasi-judicial agencies. Two examples illustrate this. A city might be party to proceedings before the state Environmental Management Commission concerning a proposed special order against pollution allegedly caused by faults in the city's sewage treatment plant.⁵⁴ A county might be party to an appeal heard by the state Property Tax Commission concerning the valuation of a particular piece of property.⁵⁵ In such proceedings, the board will want to plan litigation strategy and to be free to discuss settlement possibilities; the need for doing so in confidence is as strong here as it is with court proceedings. The policy of the exception indicates that "judicial action or proceeding" should be read to include quasi-judicial proceedings as well as those before courts.

In other contexts courts have interpreted "judicial proceedings" to include noncourt proceedings when the policies involved warranted such an interpretation. In *Jarman v. Offutt*⁵⁶ the North Carolina Supreme Court held that the defense of privilege in libel actions for statements made in "judicial proceedings" included statements made in mental commitment proceedings before the clerk of superior court. The court quoted approvingly the statement in *Corpus Juris Secundum* that "judicial proceedings" include proceedings of a judicial nature before courts or "tribunals or officers clothed with judicial or quasi-judicial powers."⁵⁷ The New York Court of Appeals has, in interpreting the same doctrine, held judicial proceedings to include discipline hearings before a bar association grievance committee.⁵⁸ The policy behind the privilege defense in both the North Carolina and New York cases was thought to justify an expansive understanding of "judicial proceedings." So too in our context, the policy behind the exception justifies a reading of "judicial action or proceeding" that includes proceedings before administrative agencies exercising quasi-judicial powers.

A second question is whether the exception extends only to proceedings that have already begun. The language is in the present tense,

54. *Id.* § 143-215.2 (Cum. Supp. 1975).

55. *Id.* § 105-290(b) (Cum. Supp. 1975).

56. 239 N.C. 468, 80 S.E.2d 248 (1954).

57. *Id.* at 472, 80 S.E. 2d at 251.

58. *Weiner v. Weintraub*, 22 N.Y.2d 330, 239 N.E.2d 540, 292, N.Y.S.2d 667 (1968).

implying a proceeding already in existence. Yet occasions arise before litigation begins that demand the same privacy as those occurring during litigation. For example, a person may have a tort claim against a local government. The parties might be negotiating the claim in hopes of preventing a lawsuit. The same requirements of privacy in developing a negotiating position apply here as they would had the suit already been filed. The policy of the exception extends to situations in which a proceeding is imminent.

Unfortunately, this interpretation offers some potential for abuse. Almost any action a government takes might be subject to subsequent legal challenge; requiring the existence of a proceeding establishes a beginning point for the exception. In situations in which the agency is the defendant, it may be possible to recognize this difficulty yet still not completely disallow application of the exception to events before a formal proceeding is begun. The exception might be admitted once some sort of formal step preparatory to litigation has been taken. Two examples will illustrate what is meant. First, section 1-539.15 of the General Statutes requires any person injured by an alleged tortious action of a city employee to notify the city within six months after the event; thirty days must then pass before suit is brought, apparently to afford time for settlement. Secondly, rule 27 of the North Carolina Rules of Civil Procedure provides for taking a deposition to obtain information for a complaint. The official notice to the city and the notice served under rule 27 exemplify the kinds of formal pre-proceeding action that might trigger the application of the exception.

When the agency is a potential plaintiff, however, such a reconciliation of interests will not avail. A plaintiff needs to choose between theories of action and otherwise develop litigation strategy before the action is begun. Although pre-litigation strategy is normally developed by an agency's attorney and not in consultation with the agency's board, there will be times when the board will be involved. In some agencies, for example, the attorney may be asked to evaluate the proposed action before the board approves bringing the action. To require all discussion to be open until the action is actually filed would place public plaintiffs at a disadvantage to private defendants.⁵⁹

59. The Illinois open-meetings statute carries an exception for meetings considering pending litigation. In *People ex rel. Hopf v. Barger*, 30 Ill. App. 3d 525, 332 N.E.2d 649 (1975) the question was whether this excepted a conference between board and attorney concerning *potential* litigation. The exception language was too specific to admit the conference, so the court simply held that it had not been a "meeting" subject to

G. *Personnel Matters*

Several questions arise under the exception relating to personnel matters.⁶⁰ First, is it an exception at all? Unlike the five exceptions discussed above, this one is phrased generally as a savings clause: the open-meetings act is not to prevent a board from meeting in private to discuss certain personnel matters. The language can be read to assume that the authorization for such a private meeting is found elsewhere and simply to assert that the open meetings act does not affect such an authorization. Under that reading, the authorization would *have* to exist elsewhere as well. In its absence, a private meeting on personnel matters could not be held.

This interpretation is unpersuasive, however. It ignores the legal situation that existed before the open-meetings statute was enacted. For most boards, the statutes were silent as to open or closed meetings. In such a situation, a board was free to hold a private session in its discretion. No widespread need existed for specific *authorizations* for private meetings on any subject. As a result few, if any, such authorization existed. (In a nonsystematic search of the General Statutes, the author found no pre-1971 statutes authorizing private meetings on personnel matters.) This is as much an exception as the five discussed above.⁶¹ If it must be seen as a savings clause, what it saves is the pre-1971 understanding that the absence of statutory direction was the equivalent of a statutory authorization of closed meetings.⁶²

Once the section is accepted as a true exception for personnel matters, the next set of questions concerns the exception's scope. Here some notion of the policy behind the exception should be helpful. One obvious policy—probably the most important—is the protection of indi-

the statute. Any other reading would, the court said, place public bodies at a disadvantage in litigation situations. *Id.* at 538, 332 N.E.2d at 659.

60. N.C. GEN. STAT. § 143-318.3(b) (1974).

61. The peculiar formulation of this exception dates from the introduction of H. 51. The bill listed several clear exceptions and then went on: "This section [which required open meetings and listed the exceptions] shall not be construed to prevent anybody [*sic*] covered by this section from holding closed sessions to consider information regarding appointment, employment or dismissal of an employee or officer or to hear testimony on a complaint lodged against an employee or officer to determine its validity." H. 51, 1971 N.C. General Assembly (version H1). It is not clear why the draftsman chose this formulation. Perhaps he was using a model from one of several other states and found this sort of language.

62. This interpretation is reinforced by the second sentence of subsection (b) of H. 51 which in similar language "saves" the right of school boards to hear student disciplinary cases in closed session. There was not in 1971, and there still is not, any explicit general law authorization to hold such a meeting in closed session.

vidual reputations. An employee may have been accused of improper conduct by a citizen or have been disciplined for such conduct by a superior. If the employee denies the conduct, the appropriate board can investigate the matter in a private hearing without publicly embarrassing him. Once made, charges are difficult to dislodge from the public consciousness, even if subsequently disproved. A related policy may be to insure more careful appointments to public positions, particularly to part-time appointments such as a planning board. Those making the appointment will feel freer to discuss a candidate's qualifications or disqualifications if the discussion occurs in private. Thus the information concerning a candidate may be made more complete. One might disagree with the force of these policies, but the legislature seems to have adopted them. The exception was made.

The exception permits closed sessions concerning matters relating to "employee[s] or officer[s] under the jurisdiction" of the board. Many boards—particularly local boards—appoint a chief administrative officer who has statutory authority to appoint, discipline, and remove subordinate employees. The attorney for the North Carolina Press Association has argued that in such a situation the only employee "under the jurisdiction" of the board is the chief administrative officer, and therefore closed sessions may be held only to discuss appointment, dismissal, etc., of that officer.⁶³

This argument takes as its premise that "jurisdiction" means power to take effective personnel action. Surely this is too narrow a reading of the word "jurisdiction." It is essentially a lawyer's definition, one borrowed from a judicial context. A court has jurisdiction over a matter if it may hear and determine it; lack of power to decide amounts to lack of jurisdiction. In a governmental context, however, jurisdiction has a broader meaning—the power to legislate or govern. The open-meetings statute itself speaks of jurisdiction over the employee or officer, not over his appointment, discipline, or removal. Even if a board does not have legal power to appoint an officer or employee, it will typically have established the position and its compensation and will frequently have adopted ordinances or policies establishing the duties of the job. In such a case, the office or position would seem within the board's jurisdiction.

In addition, boards will often be involved, in practice, in personnel decisions over which they have no legal jurisdiction in the narrow sense.

63. Raleigh News and Observer, May 10, 1974, at 42, col. 1.

A city manager may not wish to act without making clear to the council why a person is being dismissed. Despite the lack of legal power, boards do hear appeals from employees or from citizens who seek indirectly to pressure the chief administrator. Finally, boards enjoy general authority to conduct investigations into the affairs of the unit or agency they lead, and such an investigation may involve personnel matters.⁶⁴ The potential for damage to an employee's reputation is not lessened because the board conducting a hearing is without power to take action. The policy of the exception is met no less.⁶⁵

The argument above is that the exception should apply if the position is under the board's jurisdiction, even if the actual appointment or dismissal is not. What about the converse, when the position is not under the board's jurisdiction, but the appointment is? This situation occurs when a board is empowered to fill a vacancy in its own membership, as are county and city governing boards. Once the appointment is made, the position is hardly *under* the board's jurisdiction. This textual analysis was adopted by a superior court in Mecklenburg County.⁶⁶ The policy of the statute also supports this conclusion. Typically, the only sort of board that may fill its own vacancies is an elected one. When a person seeks elective office, he or she must give up some of the privacy of the private citizen. A candidate's character and finances are, especially in recent years, as important to the voters as his beliefs. By running for and serving in public office, a person accepts this intrusion on privacy. That a person is appointed to such an office does not diminish the public's need to know about these matters. People are rarely appointed to city councils or county commissions without their knowledge or consent. The willingness to accept the appointment should be

64. For example, in the summer and fall of 1974, the High Point City Council investigated the city's police department—an investigation that involved allegations of misconduct by particular police officials. *See Leak v. High Point City Council*, 25 N.C. App. 394, 213 S.E.2d 386 (1975). If, in such a situation, the council felt the results demanded the dismissal of certain officials, it would certainly make that known to the manager, even though the legal power of dismissal rested solely with the manager.

65. Often one board or group is asked, or has the power, to make personnel recommendations to another board. For example, a county may be looking for a new planning director. Although the appointment power rests with the board of commissioners, the planning board may be asked to interview each candidate and make a recommendation. In another example, although the Board of Governors of the University of North Carolina system has legal power to make certain appointments and promotions, the real point of decision is often with the full professors of the affected department. Acceptance of the narrow meaning of "jurisdiction" would open up the meetings potentially most embarrassing to persons.

66. *Arthur v. Belk*, 71 CVS 15686 (Mecklenburg County Super. Ct., Mar. 7, 1973).

understood as an acceptance of the same burdens as the candidate for election. The policy of the exception is simply not as strong for elected officials and may well not extend to their appointments.

The same arguments would not extend to appointments or removals by one board of members of another. The textual argument loses force in this context. The appointing board may have created the second board, may have established its duties, normally will control its budget. The positions involved are back *under* the board's jurisdiction. The policy considerations are different as well. With appointed boards it is not unusual for a person's name to be submitted without his knowledge or consent. We do not normally demand such windows into the private lives of these people as we do with elected officials.⁶⁷

The Act leaves to the board the decision whether to open or close a meeting on personnel matters. The committee substitute approved by the house included a provision permitting an affected employee to

67. This question was litigated at the superior court level in *Shinn v. Hair*, 75 CVS 1962 (Mecklenburg County Super. Ct., June 23, 1975). The Mecklenburg County Board of Commissioners had held closed meetings to appoint persons to the Anti-Discrimination Study Commission, the Community Energy Conservation Committee, the Charlotte-Mecklenburg Insurance Advisory Committee and the County Board of Adjustment. Each body had been established by action of the county commissioners, and the first three drew their powers entirely from the establishing resolution. The Board of Adjustment exercised statutory duties. The superior court distinguished between "officers," "employees" and "commissioners for a special purpose" and held that only the Board of Adjustment members were officers; members of the other three boards were commissioners for a special purpose and therefore not within the terms of the exception. The opinion can be challenged on its own terms. A commissioner for a special purpose is a peculiar animal, found only in article XIV, section 7 of the 1868 constitution. That section prohibited one person from simultaneously holding two public offices but permitted a commissioner for a special purpose to also hold one public office. Except in that context, which no longer exists, the commissioner for a special purpose was not and is not a living part of our law. The Mecklenburg opinion assumes that the General Assembly is in the habit of differentiating between officers and commissioners for a special purpose, which is not so and, except in the dual-officeholding context, never has been. Rather, the General Assembly frequently uses the phrase "officer or employee" with the obvious intention of including anyone in a public position. For example, N.C. GEN. STAT. § 159-28(e) (Cum. Supp. 1975) provides that if "any officer or employee" of a local government incurs an obligation or pays out money without following the pre-audit procedures of that section, he is personally liable for the sums disbursed. It is unreasonable to argue that section 159-28(e) does not apply to the members of the Mecklenburg County Anti-Discrimination Study Commission, if they should have their report printed without complying with section 159-28, because they are neither officers nor employees but rather commissioners for a special purpose. More fundamentally, however, the opinion asks the wrong questions. Whether a particular position is an office, employment, or something else bears little relation to the likelihood that discussions about the fitness of a holder or potential holder of the position may be embarrassing to that person. An analysis of a problem under the personnel exception of the statute should not lose sight of the purposes of the exception, assuming they were ever in sight.

demand a public hearing regarding any complaints against him,⁶⁸ but the provision was deleted by the senate committee. Thus the statute provides the person who is the subject of a personnel discussion no rights in deciding whether the meeting is open or closed. Even though the exception protects primarily the employee's interest, the decision to invoke it rests with the board, not the employee. If the employee is to have a voice, his right must be constitutionally based.

Three cases have addressed the issue of whether a governmental employee enjoys any constitutional right to an open hearing when he is being disciplined or dismissed. In *Fitzgerald v. Hampton*,⁶⁹ the Court of Appeals for the District of Columbia affirmed the district court's injunction prohibiting the United States Civil Service Commission from conducting a closed hearing into the reasons for plaintiff's separation from his civilian employment with the Air Force. In *Adams v. Marshall*⁷⁰ the Kansas Supreme Court affirmed the trial court's order requiring a city civil service commission to hear in open session a police officer's appeal of his disciplinary suspension. Both courts grounded their decisions on the demands of due process. In both cases, the employee enjoyed a legislated right to the hearing—by statute in *Fitzgerald*, by ordinance in *Adams*. Although both courts placed some emphasis on this fact, due process often requires a hearing before actions adverse to an individual employee may be taken, independent of any statutory right, if the employee has a significant property interest in his job (some "legitimate claim of entitlement") or if the charges against him or the action taken might so damage his reputation or ability to follow his profession that his constitutionally protected "liberty" is threatened.⁷¹ Secondly, in both cases, the hearing body had a final power of decision in the matter. These two cases suggest, then, that if the employee has a right to a hearing—either statutory or constitutional—and if the hearing body has power of decision in the matter, due process requires that an employee's request for a public hearing be granted.⁷²

68. "[A]ny such employee or officer against whom a complaint is made . . . upon his request, shall have the right to a public hearing with respect to any such complaint." H. 51, 1971 N.C. General Assembly (version H2).

69. 467 F.2d 755 (D.C. Cir. 1972).

70. 212 Kan. 595, 512 P.2d 365 (1973).

71. Board of Regents v. Roth, 408 U.S. 564 (1972).

72. The courts have tended to distinguish between quasi-judicial hearings and investigations, applying these due process protections only to the former. 1 K. DAVIS, ADMINISTRATIVE LAW § 8.09 (1958). If due process requires granting an employee's request for a public session at a hearing, it would be overly simplistic to deny a similar

On the other side, however, stands *Satterfield v. Board of Education*,⁷³ in which the Fourth Circuit held that the plaintiff teacher was not entitled to an open hearing before the school board concerning the nonrenewal of his contract. Language in the opinion indicates that the court did not think due process required a public hearing, but the holding itself is narrower, resting on the specific circumstances of the case. The teacher was black, and his nonrenewal had apparently occasioned considerable unrest in the local black community. The court noted evidence that an organized effort would be made to "overawe" the school board at the hearing and "coerce it" into renewing the contract. In these special circumstances, the public interest in reasoned decision-making countervailed whatever interest the teacher had in a public hearing.⁷⁴ On its holding, *Satterfield* may perhaps be reconciled with the other two cases. Its language indicates, however, that the basic constitutional issue remains unsettled.

What if the employee wants the hearing closed, while the board wishes it open? Although due process may require an open hearing if the employee demands it, his interest is not the exclusive one. *In re Oliver*,⁷⁵ in which the Supreme Court required that state criminal trials be public, provides the foundation for similar requirements in civil actions. The Court justified the openness requirement as providing protection against arbitrary governmental action. Although the individual's interest is most direct, society also has an interest in protecting against governmental arbitrariness. While society's interest might not demand that a personnel hearing be open if both employee and board wish it closed, it may well justify a board's decision to keep the hearing open despite contrary wishes of the employee.

H. Student Matters

The exception for student disciplinary hearings is part of the paragraph containing the personnel exception and, as with that excep-

request during an investigation simply because it is an investigation. For example, many city councils in North Carolina lack any formal power in employment decisions regarding the police chief and police department. Yet an extensive investigation of the police department, as recently occurred in High Point, may well involve extensive attacks on the reputations of specific individuals and be the ground for later disciplinary actions by the proper official. The investigation, that is, might so involve the "liberty" of an individual as to invoke due process protections.

73. Civil No. 75-1191 (4th Cir., Dec. 5, 1975).

74. *Id.*

75. 333 U.S. 257 (1948).

tion, is phrased as a savings clause.⁷⁶ However, no North Carolina statute *permits* pupil or student disciplinary hearings to be closed. If the language is to be given any effect, it must be understood as a full exception rather than as a savings clause. The policy of the exception seems also to parallel that of the personnel exception—to protect individual reputations. Finally, statutory control over the exception rests with the board, not the pupil or student.⁷⁷

Analysis of whether there exists a constitutional right of the student or pupil to demand a *public* hearing begins with *Goss v. Lopez*.⁷⁸ In that case the United States Supreme Court extended due process protection to pupils subjected to even one day suspensions. The Court required notice to the pupil and a hearing giving a right to reply to the charges. However, both notice and hearing may be very informal, taking place at the scene of the alleged misbehavior. The Court saw no need for more elaborate procedural protections, such as counsel or the right of confrontation.⁷⁹ The implication is strong that in that situation due process does not demand a public hearing.

Of course, the North Carolina open-meetings law applies only to meetings of boards; a hearing before an individual administrator does not fall within its terms. A board would enter a school discipline case only at an "appellate" level. For short suspensions, it seems unlikely that the board would be subject to more stringent due process requirements than the initial administrator; there would be no constitutional requirement to open the hearing at the pupil's request.

With long suspensions or expulsions, the situation is less clear. The *Goss* Court suggested that more formal procedural requirements would apply to long suspensions or expulsions. Several courts prior to *Goss* had addressed the question of open hearings and decided against any such right for the pupil. Each court recognized that due process was demanded, but each suggested that the full protection of a criminal trial

76. N.C. GEN. STAT. § 143-318.3(b) (1974).

77. The bill, when it left the house, permitted the pupil or student to demand a *public* hearing. The house committee substitute contained the following provision: "provided, however, that any such student shall have a right to be present and a right to be represented by counsel at any such session." H. 51, 1971 N.C. General Assembly (version H2). During floor debate, an amendment added "and upon his request, shall have the right to a public hearing." H. 51, 1971 N.C. General Assembly (version H3). Both the initial provision and the amendment were deleted by the Senate committee. H. 51, 1971 N.C. General Assembly (version H5).

78. 419 U.S. 565 (1975).

79. *Id.* at 583.

was unnecessary.⁸⁰ The hesitancy the *Goss* Court exhibited about extending due process claims too far in school matters may indicate that the earlier cases remain good law.⁸¹

I. Emergency Conditions

The final subject-matter exception, which extends only to local governments, seems straightforward enough: local boards may meet in closed session to deal with emergencies.⁸²

III. EXCLUDED AGENCIES

A. Introduction

The Act entirely excludes several named agencies and categories of agencies from the statute. Four agencies are specifically excluded: The Council of State, the Board of Awards, the Board of Paroles, and the Probation Commission.⁸³ Each has traditionally conducted business in closed session, and the General Assembly was persuaded to allow them to continue to do so. Two other exceptions are straightforward: all petit and grand juries and all occupational licensing boards. The four remaining exceptions deserve more detailed comment.

80. *Linwood v. Board of Educ.*, 463 F.2d 763 (7th Cir. 1972) (suspension of secondary school pupil); *Pierce v. School Comm.*, 322 F. Supp. 957 (D. Mass. 1971) (expulsion of secondary school pupil); *Moore v. Student Affairs Comm. of Troy State Univ.*, 284 F. Supp. 725 (M.D. Ala. 1968) (suspension of university student); *Zanders v. Louisiana State Bd. of Educ.*, 281 F. Supp. 747 (W.D. La. 1968) (expulsion of university student).

81. The Court divided 5-4. 419 U.S. at 566.

82. N.C. GEN. STAT. § 143-318.3(c) (1974).

83. *Id.* § 143-318.4. This listing is from the statute as enacted in 1971. Pursuant to a 1970 amendment to the state constitution (N.C. CONST. art. III, § 11), the General Assembly has been reorganizing state government for the last half-decade, grouping several hundred state agencies into a few departments. Consequently, both the Parole Board and the Probation Commission are now part of the Department of Correction. Reorganization has been accompanied by a formal transfer of the legal powers of each formerly separate agency to the new department of which it is a part. Therefore, as part of the reorganization of the Department of Correction, all statutory references to the State Probation Commission and most statutory references to the Parole Board were changed to "Department of Correction." Law of April 11, 1974, ch. 1262, § 10(a)(2), [1973] N.C. Sess. Laws, 2d Sess. 376. For that reason, section 143-318.4 now lists the Department of Correction as an excluded agency twice, despite the continuation of the Parole Board as the Parole Commission. N.C. GEN. STAT. §§ 143B-266 to -267. (Cum. Supp. 1976). (An example of the indiscriminate manner in which these statutory references were changed is found in section 15-206, where the Secretary of Corrections is now directed to cooperate with the Department of Correction, in order to coordinate probation and parole.) In this context it seems unlikely that the broadened language of section 143-318.4 was intended to broaden the exception as well.

B. Law Enforcement Agencies

This exception purposes to maintain the secrecy of law enforcement investigations.⁸⁴ Opening to the public a meeting of law enforcement officers discussing leads in a particular case might not only alert suspects but also damage the reputation of persons temporarily under suspicion. The principal question regarding the exception is the definition of a law enforcement agency. Certainly such agencies include a city police department, a sheriff's department, and the Highway Patrol. But many public employees enforce laws. For example, building inspectors and sanitarians enforce laws carrying misdemeanor penalties;⁸⁵ however, the departments these employees represent are not normally considered law enforcement agencies, and probably the General Assembly did not so consider them either.

The distinction between the inspector and the policeman suggested here is the power of arrest. At a minimum the officers of an agency should be vested with the power of arrest for that agency to be considered a law enforcement agency. This standard finds support in other statutes dealing with law enforcement officers. Chapter 17A of the General Statutes establishes a Criminal Justice Training and Standards Council, empowered to establish minimum standards for criminal justice officers, who include both law enforcement officers and correctional officers.⁸⁶ Administratively, the Council has defined law enforcement officers as officers vested with the power of arrest.⁸⁷ The General Assembly itself has defined law enforcement officers, for purposes of the Law-Enforcement Officers' Benefit and Retirement Fund, as officers "clothed with the full power of arrest."⁸⁸ The standard also makes sense practically. An inspection department or health department is unlikely to be making the kinds of investigations that justify the exception; secrecy is simply not necessary to their operations.

84. As introduced, H. 51 excepted "meetings of the personnel of the State Bureau of Investigation or of any other law enforcement or investigatory body where investigations are to be discussed." This formulation was not in the house committee substitute, which contains substantially the final language.

85. N.C. GEN. STAT. § 130-166.33 (1974); *id.* § 160A-423 (Cum. Supp. 1975).

86. *Id.* § 17A-2 (1975).

87. Letter to author from James F. Hoynig, Associate Director of the Council, Criminal Justice Training and Standards, Raleigh, N.C., Mar. 1, 1974.

88. N.C. GEN. STAT. § 143-166(m) (1974). The definition goes on to require also that law enforcement officers have as their "primary duty . . . enforcing on public property the criminal laws of the State and/or serving civil processes." The apparent intention of this additional qualification is to except company police, deputized pursuant to *id.* §§ 74A-1 to -6 (1975), from the retirement system.

In most cases, if an agency's officers have the power of arrest, that will be sufficient to include the agency within the exception. In a few instances, however, the power of arrest is obviously incidental to other duties. State park rangers are appointed as special peace officers with the power of arrest in order to enforce park regulations,⁸⁹ but this takes only a very small portion of their time. In some cities, firemen are authorized to make arrests of persons obstructing fire-fighting activities.⁹⁰ In such a situation, in which the arrest power is obviously incidental to the officer's principal responsibilities, the employing agency should not be considered a law enforcement agency.

One other question arises. The exception, by its language, extends to "all law-enforcement agencies." Does it thereby extend to all activities of a law enforcement agency? For example, law enforcement officers, as understood here, include state and local Alcoholic Beverage Control (ABC) enforcement officers and wildlife protectors. Does the exception therefore also include the state and local ABC boards and the Wildlife Resources Commission? The policy of the exception indicates at most a partial inclusion within it of these boards. Most of their work has nothing to do with law enforcement in specific cases, and therefore the presumed purpose of the exception is not engaged. However, there may be occasions when particular cases are discussed with the board, and these discussions should be within the exception.

C. Study, Research and Investigative Bodies

The exception provided by section 143-318.4(7) of the General Statutes is really two exceptions. The words "including the Legislative Services Commission" were added by a senate floor amendment, and the location probably seemed convenient. Generally, the Services Commission is charged with providing and supervising support activities for the General Assembly,⁹¹ and none of its duties can easily be characterized as involving study, research, or investigation. Rather, it has had occasion to meet in closed session in the past, and presumably the amendment was simply to permit that practice to continue.

The other exception is, of course, for "study, research and investigative commissions and committees." Clearly, the exception includes all agencies whose sole purpose is either study, research, or investiga-

89. *Id.* § 113-28.2 (1975).

90. *E.g.*, CHARLOTTE CITY CHARTER, ch. 713, § 6.82, [1965] N.C. Sess. Laws 958.

91. N.C. GEN. STAT. § 120-32 (1974).

tion, such as the state study commissions frequently created to function between general assemblies, or an administrative committee within a local government studying whether and how to place greater financial reliance on user charges. The principal question raised is whether the exception also extends to groups normally subject to the law while they are engaged in study, research, or investigatory tasks. For example, does it include a city council while conducting an investigation of the police department, a planning commission while studying the downtown area preparatory to developing a central business district plan? If one looks to the apparent policies behind the exception, strong arguments emerge for including the council and planning commission within the exception.

Those policies are clearest with regard to investigative efforts. Frequently an investigation will be concerned with charges that if true would severely impair the reputations of persons being investigated. Unfortunately, once broadcast, even groundless charges could damage a reputation. To avoid such needless damage, investigations often are conducted in private. In addition, witnesses will sometimes be afraid to come forward if an investigation is conducted publicly. Finally, an investigation conducted secretly is less likely to alert those being investigated, a consideration sometimes of some importance. Probably these kinds of considerations led to the exception for investigative groups. The policies regarding study and research are less plain, but probably involved a sense that these activities simply were inappropriate for a continuing requirement of openness. Then, too, the line between study and investigation is not sharp, and some of the considerations pertinent to the latter may have been seen to spill over to the former as well.

These policies are as applicable to a city council's investigation as to that of a legislative committee created specifically for investigation. An investigation by a council could damage reputations as easily as could one by a group whose sole purpose was investigation. This argument is met, however, by the language of the exception itself, which in its most natural reading includes only groups whose purpose is study, research, or investigation and no more. And here the language may suggest another aspect of the policy. A group whose sole purpose is study, research, or investigation typically has no power of decision. Rather, it uses its findings to make recommendations to another group, and it may normally be expected to document, or at least defend, its recommendations. During that process many of its proceedings will enter the public domain. The city council investigating the police

department, however, is a decisionmaker as well; it may implement its own recommendations, without need of defending them before another body. Thus the underlying findings may never come to public attention. Given that difference from the actual investigating commission, a limitation of the exception to the single-purpose group makes sense.

D. *Quasi-Judicial Agencies*

All "State agencies, commissions or boards exercising quasi-judicial functions" are excepted "during any meeting or session held solely for the purpose of making a decision in an adjudicatory action or proceeding."⁹² The exception is consistent with that for fully judicial agencies—the grand and petit juries and the appellate courts.

"Quasi-judicial" is not defined, but the term has been glossed by the supreme court. Former chapter 143, article 33 (Judicial Review of Decisions of Certain Administrative Agencies) of the North Carolina General Statutes,⁹³ applied to "administrative decisions" as defined by section 143-306(2): "any decision, order, or determination rendered by an administrative agency in a proceeding in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an opportunity for agency hearing." In *Duke v. State ex rel. Shaw*⁹⁴ the court characterized former article 33 as contemplating a "quasi-judicial hearing in which the parties were permitted an opportunity to offer evidence and a decision rendered applicable to a specific factual situation."⁹⁵ In *In re Markham*⁹⁶ the court noted that a local board of adjustment exercises quasi-judicial power, "it being its duty to investigate facts and from its investigation to draw conclusions as a basis of official action and to exercise discretion of a judicial nature."⁹⁷ Thus, a quasi-judicial proceeding might be characterized as one involving specific parties, one or more hearings at which evidence is taken, legal conclusions drawn from the evidence, and legal determinations made that are binding on the parties.

Numerous boards, commissions, and agencies of state government exercise quasi-judicial powers. A lengthy and careful effort would be

92. *Id.* § 143-318.4(8).

93. This article has been replaced by the North Carolina Administrative Procedure Act, N.C. GEN. STAT. §§ 150A-1 to -64 (Cum. Supp. 1975).

94. 247 N.C. 236, 100 S.E.2d 506 (1957).

95. *Id.* at 239, 100 S.E.2d at 508.

96. 259 N.C. 566, 131 S.E.2d 329 (1963).

97. *Id.* at 572, 131 S.E.2d at 334, quoting *Harden v. City of Raleigh*, 192 N.C. 395, 397, 135 S.E. 151, 152 (1926).

necessary to compile a complete listing, but examples would include the state ABC Board, the state Property Tax Commission, the state Board of Elections, the Banking Commission, and the Industrial Commission.⁹⁸

The difficult problem raised by this exception is whether it extends to quasi-judicial agencies of local government. Zoning boards of adjustment, in granting variances from or special exceptions to the zoning ordinance, exercise quasi-judicial powers. County boards of equalization and review, in hearing appeals from the tax supervisor, exercise quasi-judicial powers. Local election boards, in hearing registration challenges and investigating election law violations, exercise quasi-judicial powers. So, in some circumstances, do county boards of social services, local boards of education, civil service boards, and probably other agencies as well.

The same policies that justify excepting state level quasi-judicial proceedings apply to local proceedings. Once the hearing is completed and the evidence taken, the hearing agency must be able to consider and discuss the evidence freely. If a witness is not believed, it is much easier to say so, and why, when the witness or his attorney is not listening in the audience. Judicial fact-finders are not required to meet in public or explain their interpretation and weighing of the evidence; quasi-judicial fact-finders, whether acting at the state or local level, undertake the same sort of tasks as judicial fact-finders. The policy of the exception argues for including local agencies.

The principal argument against extending the exception to local quasi-judicial agencies arises from the exception's language: it speaks of "State agencies, commissions or boards exercising quasi-judicial functions."⁹⁹ It is not difficult to find and cite cases in which courts have characterized agencies of local government as "state agencies." After all, local government in North Carolina exists only by action of the General Assembly and is essentially a convenient means of exercising the basic governmental powers that rest with the state. Thus understood, all local government agencies are state agencies. This is the theory by which actions of cities or counties can be characterized as "state actions" under the fourteenth amendment.¹⁰⁰ But the open-meetings statute clearly applies to both state and local government, and

98. N.C. GEN. STAT. §§ 18A-15(12), 105-290, 113-22, 143-291 (Cum. Supp. 1975).

99. N.C. GEN. STAT. § 143-318.4(8) (1974) (emphasis added).

100. See, e.g., *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

so the casting of this one exception in terms of "state" agencies is most naturally read as an extension of the exception to state agencies only, as distinguished from local agencies.

If we must accept that the language of the quasi-judicial exception will simply not stretch to include all quasi-judicial agencies otherwise subject to the open-meetings law, we still must consider the essential characteristics of a *state* agency exercising quasi-judicial powers, as opposed to a *local* agency. The policy considerations outlined above justify an expansive understanding of "state." Three possible tests follow by which the line between state and local might be drawn. They are not entirely serial, and some agencies that might be included under the first test would not be included under the second. Therefore, the three tests should not be considered mutually exclusive; perhaps an agency that meets any one test should be considered a *state* agency.¹⁰¹

1. *State supervision.* An agency subject to extensive direction and control by a state government department might be considered a state agency for purposes of the exception. Although such an agency might be locally appointed and in part locally funded, it is to a significant degree simply an administrative arm of the state department. Examples of such agencies, each of which sometimes exercise quasi-judicial functions, would include local boards of election, local boards of social services, and local school boards.

2. *Statutory duties.* A second test would extend the exception to agencies whose duties are set by statute, as distinguished from those whose duties are set by local ordinance or resolution. So read, the exception would include some of the agencies included under the first test and also an agency such as a county board of equalization and review.

3. *Statutory creation.* The broadest test would extend the exception to any agency created or required by statute, that is, by the General Assembly. Agencies created by ordinance—such as local personnel appeals boards or human relations commissions—would still be excluded.

101. The suggested lines are difficult to defend in the context of the exception itself. That is, it is not clear why an agency should be included within the exception simply because it is subject to extensive state government direction, or because its duties are set by state statute. The difficulty, however, rests with the basic statutory distinction. What is there about the work of a *state* quasi-judicial agency, as opposed to a local agency, that justifies closed deliberations for the state agency alone?

E. Legislative Committees

The final exception of the section asserts the right of any legislative committee or subcommittee to meet in closed session but requires that final action be taken in open session.¹⁰² The exception was added by a senate floor amendment, and the language tracks the senate rules then in force.¹⁰³ In 1973 the house adopted a rule requiring its committees and subcommittees always to permit attendance by the public,¹⁰⁴ imposing on itself a more rigorous standard than does the Act.¹⁰⁵ Either house could probably also adopt a rule subjecting itself to a standard less rigorous than the statute, perhaps by expanding the justification for a closed meeting or permitting final action to be taken in closed session. Each house of the General Assembly bears responsibility for its own rules, and it is generally agreed that one General Assembly may not bind a successor, particularly in an internal matter such as rules.¹⁰⁶ Although it is not usual, rules might certainly be adopted by statute. However, a rule adopted by statute ought not to be accorded any greater dignity than other rules; it should be repealable by simple action of either house. Otherwise, simply by adopting rules by statute, one General Assembly could bind its successors unless both houses were willing to change the rule. Thus it would seem that the Act binds each house of the General Assembly only so long as that house's rules do not provide otherwise.

IV. STATE BUDGET PREPARATION AND APPROVAL

The Act makes special provision for several agencies involved in the state budget process: the Advisory Budget Commission and the various appropriations committees of the General Assembly.¹⁰⁷ The Advisory Budget Commission, consisting of several legislators and gub-

102. N.C. GEN. STAT. § 143-318.4(10) (1974).

103. Rule 36 provided, in part, that "[a]ny committee has the inherent right to hold an executive session when it determines that it is absolutely necessary to have such a session in order to prevent personal embarrassment, or when it is in the best interest of the State; and in no event shall final action be taken by any committee or subcommittee except in open session." SENATE RULES DIRECTORY, [1969] N.C. General Assembly 22.

104. Rule 29(b) provides: "Subject to the provisions of the subsection (c) of this Rule [which permits the chairman to bar persons from a committee's meeting in order to maintain order], standing committees and subcommittees thereof shall permit other members of the General Assembly, the press, and the general public to attend all sessions of said committees and subcommittees." H. JOUR., [1973] N.C. General Assembly 1056.

105. N.C. GEN. STAT. § 143-318.4(10) (1974).

106. See *State v. Norman*, 237 N.C. 205, 74 S.E.2d 602 (1953); 73 AM. JUR. 2d *Statutes* § 49 (1974).

107. N.C. GEN. STAT. § 143-318.5 (1974).

ernatorial appointees, works with the Governor and his budget director in preparing a proposed state budget for each General Assembly. The appropriations committees are, of course, the legislative committees that receive that proposed budget.¹⁰⁸

1. *Advisory Budget Commission.* The provisions with regard to the Commission are plain. Its work is divisible into two segments. First, it holds a series of public hearings on budget requests from state departments and agencies. Second, it holds a series of meetings to review those requests and shape the proposed budget. Section 143-10 of the General Statutes requires the first, public hearing segment, and the second part of section 143-318.5(a) is intended to keep those hearings public. It is the second segment of the Commission's work that accounts for its specific mention in the open-meetings act. Commission meetings held for "actually preparing the [state] budget" are expressly excepted from the Act.

2. *Appropriations Committees.* The work of the appropriations committees of the General Assembly might also be divided into two segments, a public hearing segment and a series of meetings to shape the budget for presentation to each house. Paralleling the Advisory Budget Commission, the second segment has traditionally been carried on in closed session.

The open-meetings act takes note of the legislature's budgetary process in section 143-318.5(b), which, in typical savings-clause language, provides that nothing in the open-meetings act is to have any effect on section 143-14. The latter provides, in appropriate part, as follows: "The appropriations committees . . . and subcommittees thereof shall sit jointly¹⁰⁹ in open sessions while considering the budget To these sessions of the joint committee or subcommittees shall be admitted, with the right to be heard, all taxpayers or other persons interested in the estimates under consideration."¹¹⁰ It can be argued

108. For many years, and until 1975, the General Assembly used a single (joint) appropriations committee, with one or more joint subcommittees, in reviewing the Governor's proposed budget. In 1975, however, the house established two committees for the review process: the Appropriations Committee, which reviewed requests for new programs, and the Base Budget Committee, which considered whether existing programs should be continued. Because the senate retained a single appropriations committee, the practice of a joint committee could not be maintained and the two houses proceeded independently.

109. N.C. GEN. STAT. § 143-14 (1974) recognizes that its directions are in the character of a rule of each house, and as such, may be changed by rule of either house. Thus, no amendment of the statute was necessary when joint hearings became impossible with the 1975 reorganization of the house committee system.

110. *Id.* § 143-14.

that this section is intended to apply only to the public hearing stage of the committee's work since the public "right to be heard" would be inappropriate once the hearing stage was completed. However, the General Assembly has indicated at least twice¹¹¹ that it understands the public's right to be present to extend to all the committee's work. Therefore, the construction issue is simply noted.

The open-meetings act, then, expressly provides that it is to have no effect on the mandate of section 143-14 that the appropriations committees and subcommittees carry out their work in public. In the absence of the savings clause, the Act seemingly would abrogate section 143-14, for, as noted, section 143-318.4 emphatically affirms the "inherent right" of any committee or subcommittee of the General Assembly to hold an executive session when it determines such a session to be necessary. The obvious effect of section 143-318.5(c), it would seem, is to prevent such an abrogation.¹¹² The Attorney General reached just this conclusion in 1973, advising the chairmen of the appropriations committees that executive sessions of either the joint committee or any subcommittees would violate the open-meetings act.¹¹³ A joint subcommittee had begun the final shaping of the budget in the traditional secrecy, and the news media had objected.¹¹⁴ This occasioned the inquiry to the Attorney General, and his advice was thereafter followed.

If some future General Assembly should wish to permit the appropriations committees once more to meet behind closed doors, it need not amend the open-meetings act; it could simply change its rules. The last sentence of section 143-14 provides: "In so far as this section prescribes the method and manner of hearings before [the appropriations] committees this section shall be considered and have the force of a rule of each branch of the General Assembly while and unless a change has been made by an express rule of such branch thereof." This sentence is probably declaratory of the law, as one General Assembly should not be able to adopt rules binding on its successors simply by adopting them in statutory form.¹¹⁵ Such an interpretation was apparently accepted by

111. In 1955 and 1973. See text accompanying notes 116-19 *infra*.

112. That purpose, clear on the face of the statute, does not accord with the legislative history. The savings clause is in the senate committee substitute, inserted by the senate committee. The "inherent right" exception was inserted later, as a senate floor amendment. It is not usual to apply the cure before the sickness strikes. See note 8 *supra*.

113. Letter from Attorney General Robert Morgan to Carl J. Stewart, Jr., Chm. of House Approp. Comm., April 30, 1973.

114. See Raleigh News & Observer, Apr. 25, 1973, at 4, col. 1.

115. See text accompanying notes 104-06 *supra*.

the 1955 General Assembly, which did modify the statute by rule. The 1953 session had been marked by embarrassing publicity of secret meetings by the appropriations subcommittee. Despite the language of section 143-14, subcommittee deliberations had, by 1953, enjoyed a long history of secrecy. However, the 1953 subcommittee began its deliberations with a declared policy of openness—a policy it was ready to surrender within a week. But that year the reporters refused to leave, pointing to, among other arguments, the requirements of section 143-14. In a classic steamroller, a bill permitting closed sessions of the committee or any subcommittee was introduced and enacted in one day.¹¹⁶ That ended the matter in 1953. The first day of the 1955 session, however, saw introduction of a repeal of the 1953 amendment, and the matter again was discussed in the press. Eventually the 1953 amendment was repealed,¹¹⁷ but not before each house adopted a rule that permitted *any committee* to meet in executive session.¹¹⁸ It was only after the 1973 house amended its rules to require open meetings of all committees¹¹⁹ that the stage was set for the Attorney General's opinion mentioned above.

116. The Act added the following proviso to the end of N.C. GEN. STAT. § 143-14 (1974):

Provided, after public or open hearings have been held and opportunity has been afforded all persons interested in any appropriation to be heard thereon, the joint committee or any subcommittee thereof, within the discretion of the committee or subcommittee, may hold Sessions at which only members of the committee or subcommittee and those designated by the committee or subcommittee may attend, for discussion and consideration of any and all matters referred to the committee or subcommittee, but final action by the joint committee shall not be taken with respect to any appropriation except in open meetings of the joint committee.

Law of March 27, 1953, ch. 501, [1953] N.C. Sess. Laws 374.

The events leading up to passage of chapter 501 are reported in the Raleigh News and Observer, Mar. 18, 1953, at 1, col. 6; Mar. 25, 1953, at 1, col. 1; Mar. 26, 1953, at 1, col. 8. The *News and Observer* reported that on the afternoon of March 25, the subcommittee sought to avoid the press by renting and meeting in a small dining room at the Carolina Hotel. Several reporters were tipped off, however, and were waiting for the members at the hotel. Therefore, the paper reported, the committee locked the dining room door and went in through the hotel kitchen. *Id.*, Mar. 26, 1953, at 1, col. 8.

117. Act of Jan. 28, 1955, ch. 5, [1955] N.C. Sess. Laws 4.

118. The house acted first, adopting a new rule that provided in appropriate part: "Provided further, that upon the affirmative vote of a majority of the members of any standing committee or sub-committee executive sessions may be held, but in no event shall final action be taken in executive sessions." H. JOUR., [1955] N.C. General Assembly 50. The senate responded to the house action with a rule that assumed committees could meet in closed session as they wished: "Notwithstanding [*sic*] the inherent right of any committee or sub-committee to hold Executive Sessions, no committee or sub-committee shall take any final action on any measure or thing before it except in open Session." S. JOUR., [1955] N.C. General Assembly 51.

119. See text accompanying note 104 *supra*.

V. MINUTES OF EXECUTIVE SESSIONS

The minutes of a governmental board are the official evidence of its actions. For many boards, the statutes require that minutes be kept;¹²⁰ for all boards, minutes are necessary to prove that actions have been properly authorized or taken. Minutes of a governmental board are public records, available to the public under North Carolina's public record statute.¹²¹ Against this background, two questions arise. First, must minutes be kept of executive sessions? And secondly, if so, are those minutes then to be open to the public?

In many instances, no problem need arise. Although no statute defines the degree of detail necessary in a board's minutes, the General Assembly has provided substantial direction to governmental boards in this matter through its own example. The journals of each house constitute the minutes of the General Assembly. Those journals do not record debate; unless specific request is made, they do not record statements by members. Rather, they simply record each action taken and no more. The fundamental reason for minutes or journals is to prove what action has been taken by a board or assembly and by what procedural steps. The legislative journals answer that need. Certainly, what suffices for the General Assembly ought to suffice for the governmental boards of state and local government. All that minutes need do is record actions; a discussion alone, no matter how extended, need not be reflected in the minutes.

Many—probably most—executive sessions consist only of discussion. At most, the minutes need show only that an executive session was held, perhaps stating the general topic—acquisition of property, a personnel matter, etc. No difficulty should arise in making such minutes public immediately. With those executive sessions in which an action is taken, it may be the discussion that occasions the secrecy, rather than the resulting action. For example, a city council might meet in private to discuss the three final candidates for the position of city manager, concluding with a decision to hire one of the three. If the minutes simply recorded the decision, again no difficulty should arise from making the minutes public immediately.

Unfortunately, the problem cannot always be avoided. Some executive sessions will result in a decision that should, at least for a time, be kept private. To return to an earlier example, a session to consider the acquisition of property may result in a specific action: a direction to

120. *E.g.*, N.C. GEN. STAT. § 153A-42 (1974).

121. *Id.* § 132-1.

the board's negotiator. If those directions become public information before negotiations are concluded, the entire purpose of the executive session has been frustrated.

Yet how is publicity to be avoided? Practical need or statutory direction requires that minutes be kept; the public-records statute then makes them public information. It is not a sensible answer to admit this result makes little sense but cannot be escaped. A better answer is to suggest that the open-meetings law, with its permission to hold executive sessions, has the effect of amending—to a minor degree—the public-records statute. The open-meetings law recognizes that confidentiality in public business is sometimes justified. For as long as the justification continues, that confidentiality ought not to be lost by the action of another statute. Once the justification is lost, of course, no need for confidentiality continues. Thus, in the example, once negotiation had concluded, the minutes of the executive session should become public record. The public-records statute embodies a policy of absolute openness, but one that dates from 1935. The open-meetings law—a much more recent statute—embodies a more complex policy. To the extent that reconciliation between the two policies is necessary, the more recent has stronger claim to prevail.

VI. REMEDIES

A. *Injunctive Relief*

The Act permits any "citizen denied access to a meeting required to be open" to seek appropriate relief in order to compel compliance with the Act.¹²² This provision has been the basis for several suits brought by reporters or their employers¹²³ against boards that barred the reporter from a meeting. When the court has found for plaintiffs in such suits, there has been an unfortunate tendency to enter a judgment enjoining the defendant board and its members from violating any

122. *Id.* § 143-318.6.

123. The statute permits suits by *citizens* denied access, and "citizen" normally connotes a natural, as opposed to artificial, person. Therefore, the reporter, rather than the employee, should be the party plaintiff. In *Eggimann v. Wake County Bd. of Educ.*, 22 N.C. App. 459, 206 S.E.2d 754 (1974), the court of appeals suggested that the requirement that the plaintiff have been actually denied access makes inappropriate a class action seeking equitable relief under North Carolina General Statutes section 143-318.6. *Id.* at 462, 206 S.E.2d at 757. It is individuals who are turned away from council doors, not classes. However, if the notion of denial of access is to include lack of reasonable notice of a meeting, see text accompanying note 27 *supra*, then a class action alleging denial of access of that sort would seem appropriate.

provision of the open-meetings law.¹²⁴ This language of the statute is ambiguous, and it is clear that legitimate divisions of opinion are possible, perhaps even likely, over many of its provisions. A board under a flat injunction not to violate the statute is likely to be very careful in any gray area of the statute, preferring to meet in public rather than run the risk of being held in contempt. As a result, some of the policy considerations recognized by the inclusion of the exceptions in the statute might be vitiated.¹²⁵ More appropriate injunctive relief would be to forbid the specific conduct that led to the lawsuit. For example, if a board met in closed session to consider filling a vacancy in its own ranks and this was held to be a violation of the statute,¹²⁶ the appropriate injunctive relief (if anything more than declaratory relief were thought necessary) would be to prohibit closed meetings to consider that particular subject. Such an order presumes the general good intentions of the board toward the statute, and it is only when that presumption is challenged—such as, by a series of invalidly closed meetings—that a blanket injunction would be proper.

Although injunctive relief is the only remedy explicitly provided by the statute, the remedies section states that it is “in addition to other remedies.” In addition, the section empowers a plaintiff to seek a restraining order, an injunction, “or other appropriate relief.” The statute itself, then, invites speculation about other remedies, and the discussion below focuses on two: criminal sanctions and voiding actions taken at improperly closed meetings.

B. Criminal Sanctions

Two old statutes make criminal the failure of public officials to discharge their official duties. Section 14-230 of the General Statutes provides that if a public officer “shall willfully omit, neglect or refuse to discharge any of the duties of his office,” he has committed a misdemeanor. Section 14-231 provides that if a *state or county* officer “shall fail, neglect or refuse . . . to discharge any duty devolving upon him by virtue of his office,” he has committed a misdemeanor. The chief

124. For example, in *Arthur v. Belk*, 71 CVS 15685 (Mecklenburg County Super. Ct., Mar. 7, 1973), the court enjoined the Charlotte City Council from holding closed meetings except for the subjects excepted by N.C. GEN. STAT. § 143-318.3 (1974).

125. In *Channel 10, Inc. v. Independent School Dist. No. 709*, 298 Minn. 306, 215 N.W.2d 814 (1974), the Minnesota Supreme Court suggested that a general prohibition against violating the Minnesota open-meetings statute might be too broad, on the sorts of considerations sketched here.

126. See text accompanying note 66 *supra*.

differences between the two sections seem to be, first, that section 14-230 requires a *willful* failure to discharge duties while section 14-231 does not; and secondly, section 14-230 applies to all public officers while section 14-231 applies only to state and county officers.

These two statutes may cover violations of the open-meetings statute. It is not clear that they do, because it is not clear that the open-meetings law creates any "duties." Certainly it creates no direct duties of the character of a duty to erect and repair county buildings,¹²⁷ to appoint a recorder,¹²⁸ to return process,¹²⁹ or even to enforce the laws,¹³⁰ each of which has been the actual or mooted subject of a prosecution under one or the other of these two statutes. Rather, the open-meetings law sets out procedural requirements, that is, requirements of openness, that must be followed when boards meet to carry out their substantive duties. At most, one might construct from the laws a duty to meet in open session except when the law permits a closed meeting—not a very specific duty.

Given the reasonable differences of opinion as to what is actually demanded or permitted by the open-meetings law, criminal sanctions in all but the most egregious and sustained violations would seem inappropriate. As a practical matter, they are very unlikely to be invoked.

C. Voidability

In *Lewis v. White*¹³¹ the plaintiffs sought to keep the state's art museum in downtown Raleigh, despite a decision by the Art Museum Building Commission to build it on the city's outskirts. Among the several arguments made by the plaintiffs was that the Commission had systematically held all its meetings in closed session in violation of the open-meetings statute, and that therefore all decisions emerging from those meetings, including the location decision, were void. Because the statute was silent on this point, the supreme court declined to hold with plaintiffs.¹³²

It is important to understand just what this part of *Lewis v. White* held. The plaintiffs argued that any action emanating from a meeting held in violation of the statute was *automatically* void. This argument

127. *State v. Leeper*, 146 N.C. 655, 61 S.E. 585 (1908).

128. *State ex rel. Battle v. City of Rocky Mount*, 156 N.C. 329, 72 S.E. 354 (1911).

129. *State v. Berry*, 169 N.C. 371, 85 S.E. 387 (1915).

130. *State v. Hord*, 264 N.C. 149, 141 S.E.2d 241 (1965).

131. 287 N.C. 625, 216 S.E.2d 134 (1975).

132. *Id.* at 632, 216 S.E.2d at 139.

the court declined to accept.¹³³ Not raised, and therefore not decided, was whether voiding such an action would be a permissible remedy in a proper case—that is, whether actions taken at a closed meeting, though not *void*, might still be *voidable*.

The statute's silence as to the voidability of actions is not necessarily fatal to such a remedy. Courts often require compliance with procedural requirements—and the open-meetings law is essentially a procedural requirement—as a condition of the legality of substantive actions. If the procedural requirement is not met, the action is voided. *Bagwell v. Town of Brevard*¹³⁴ offers a North Carolina example of this practice. In the summer of 1965 the town of Brevard decided to dispose of some real property pursuant to section 160-59 of the General Statutes, which required thirty days published notice before the sale.¹³⁵ The town began advertising on July 22 for an August 21 sale. A few days later, however, it was discovered that the original advertisement had contained an error, so a new one was prepared and first published on July 29. The sale was still held on August 21. Plaintiff was successful bidder on the twenty-first, and on August 23 the town council directed its attorney to close the sale. Another bidder then appeared, however, prepared to pay several thousand dollars more than plaintiff, and the town accepted this new offer. In this action for specific performance of the contract of sale between plaintiff and the town, the court held that the thirty-day notice required by the statute had not been given, and therefore the August 21 sale and subsequent contract with plaintiff were void.¹³⁶ No statute expressly authorized this remedy.

If actions are to be voidable, in what kinds of situations should this remedy be used? The most obvious situation would be one in which the violation of the open-meetings statute seems to have had a demonstrable effect on the substantive action taken. The recent case of *Sullivan v. Credit River Township*¹³⁷ illustrates the kind of situation in which voiding an action seems most appropriate. In May and June 1971, the plaintiff met three times with the governing board of the defendant township to discuss a prospective landfill site. Each meeting was held without public notice. At the third meeting, the board approved the site and entered a contract with the plaintiff, who was to develop

133. *Id.*

134. 267 N.C. 604, 148 S.E.2d 635 (1966).

135. Act of June 10, 1959, ch. 862, [1959] N.C. Sess. Laws 876.

136. 267 N.C. at 608, 148 S.E.2d at 638.

137. 299 Minn. 170, 217 N.W.2d 502 (1974).

and operate the landfill. Landfills are not popular with neighbors, and, when the neighbors of this one discovered what had happened, they demanded that the contract be rescinded. In December the board held a well-publicized and well-attended hearing on the matter and, as a result, did rescind the contract. It seems clear that had the earlier meetings been held in public, the contract would never have been executed.¹³⁸ Anyone who has ever attended a large public hearing with an excited crowd in attendance knows the force that such a public can have on the decisionmakers. When a board meets in illegal closed session, in an attempt to avoid that kind of public pressure, its actions present the strongest case for voidability.

Beyond this simple sort of factual situation, voidability becomes much more complex. The suitability of such a remedy will depend on a number of factors, and their weight would have to be developed case by case. A further look at the *Sullivan* case demonstrates one sort of complicating factor, a very important one, for in the actual case the court refused to void the contract between plaintiff and the township. Once the contract was signed, plaintiff bought the site and commenced to prepare it for landfill operations, spending about \$10,000 in the process. He had developed a reliance interest of sorts in the contract, and to void it would have imposed an unfair burden on him because of the board's illegal action.¹³⁹ Once persons have begun to act in reliance on a challenged action, the arguments for voiding that action, particularly in the face of the statute's silence, become weaker. Thus the remedy of voidability is most suitable in an action begun quite soon after the meeting involved.

CONCLUSION

Although sometimes unartfully drawn, the provisions of the open-meetings law are clearly suggestive of the purposes they seek to serve. This article has attempted to demonstrate a method of statutory interpretation that consistently seeks statutory meaning in the context of these purposes.¹⁴⁰ An interpretational method that respects statutory purpose should lead to results that in turn engender respect for the statute itself and what it attempts to do. Its logic will become understandable and, once understood, more likely of appreciation.

A literal reading of the statute, without reference to and often without regard for purpose, cannot help but sometimes thwart purpose

138. See *id.* at 173, 217 N.W.2d at 505.

139. *Id.* at 172, 217 N.W.2d at 504.

and lead to results that appear irrational. If that occurs, if the outgrowth of the statute does at times seem irrational, it is the statute itself that suffers. It suffers in application, for to the groups that it governs it becomes a nuisance, a series of arbitrary rules that through careful navigation can sometimes be evaded. And it suffers in adjudication, for if the literal application of one provision leads to a nonsensical result, a court may be tempted to offer a strained interpretation of another provision, thereby avoiding the irrationality, but at the possible expense of the statute.

140. In a decision announced as this Article went to press, the court of appeals decided *News & Observer Publishing Co. v. Interim Board of Education for Wake County*, 29 N.C. App. 37 (1976). The court addressed three questions raised by this Article. First, it held that a requirement of public notice was implicit in the open-meetings statute. See text accompanying notes 25-27 *supra*. Second, on a purely textual analysis, it held that the personnel exception did not permit a board to meet in closed session to consider or fill a vacancy on the board itself. See text accompanying note 66 *supra*. Third, the court indicated that a board otherwise subject to the statute might in certain circumstances avail itself of the investigative committee exception by resolving itself into a committee of the whole. See text accompanying note 91 *supra*. Unfortunately, the court gave little indication of what sorts of investigations by a committee of the whole could properly be closed, simply announcing that the meeting in question—held to fill a vacancy on the defendant school board—was not one.

The court also addressed a question not raised in this Article. It held that implicit in the statute was a prohibition on voting by secret ballot on matters required to be discussed in open, unless the ballots, showing how each member voted, were made public.

